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IN THE

Supreme Court of the United States

October Term, 1968

No. 795

LEWIS M. ALEXANDER and RUTH M. ALEXANDER,
Petitioners,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Delaware corporation; COLORADO-UTE ELECTRIC ASSOCIATION, INC., a Colorado corporation; AND YAMPA VALLEY ELECTRIC ASSOCIATION, INC., a Colorado corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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Citation to Opinion Below

The citation for the opinion of the Supreme Court of Colorado in the instant case is *Alexander vs. Morrison-Knudsen Company,* et al. —Colo.—, 444 P.2d 397 (1968)

Jurisdiction

The petitioners have attempted to invoke the jurisdiction of this court by the provisions of 28 U.S.C., Sec. 1257 (3). In the opinion of this respondent, no federal question is presented.

Question Presented

The sole question presented by the case at bar is one of procedure involving the application of Rule 41 (a) (1) of the Colorado Rules of Civil Procedure.

Rule of Procedure Involved

The rule of procedure involved in this case is Rule 41 (a) (1) of the Colorado Rules of Civil Procedure. That rule provides as follows:

"Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; By Stipulation. Subject to the provisions of rule 23 (c), of rule 66, and of any statute, an action may be dismissed by the plaintiff upon payment of costs without order of court (i) by filing a notice of dismissal at any time before filing or service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim."

Statement

The instant case arises from the voluntary actions of the petitioners in filing two separate notices of dismissal

pursuant to Rule 41 (a) (1) of the Colorado Rules of Civil Procedure in two separate and distinct lawsuits which both involved the exact same claim. The petitioners originally filed their Complaint in the District Court in and for the City and County of Denver, State of Colorado [1-16]*. Subsequently, the other respondents filed motions to dismiss that Complaint, but this respondent filed no such motion. Ultimately, all of the respondents did file a Motion for Change of Venue to transfer the cause to the District Court in and for the County of Routt, which motion was granted on October 2, 1964 [17-20].

After the Motion for Change of Venue was granted, the petitioners then filed a Petition for Writ of Prohibition in the Supreme Court of Colorado; however, the petition was denied [38-87]. On December 8, 1964, the petitioners dismissed the case in the state court by filing a "Notice of Dismissal" pursuant to Rule 41 (a) (1) of the Colorado Rules of Civil Procedure [81-82].

The petitioners then proceeded to file essentially the same Complaint against all of the same respondents in the United States District Court for the District of Colorado, even though complete diversity of citizenship was lacking [110-126]. The respondents filed motions to dismiss the Complaint due to the lack of complete diversity of citizenship. These motions were never determined by the court, for on January 12, 1965, the petitioners filed a "Voluntary Dismissal Without Prejudice under Rule 41 (a) (1)" in the United States District Court [127-129].[1]

Inasmuch as the respondents had filed two notices of

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*Numbers in the brackets [ ] are folio numbers from the Record.

[1]On December 12, 1968, the United States District Court for the District of Colorado denied the motion of the petitioners to vacate or set aside their dismissal and further ordered that the dismissal operated as an adjudication upon the merits. Therefore, the case was dismissed with prejudice. The order of the United States District Court to that effect is printed in Appendix A.

dismissal pursuant to Rule 41 (a) (1), on January 18, 1965, the respondents moved to dismiss the plaintiffs' Complaint with prejudice in the District Court in and for the County of Routt. This Motion was ultimately granted by the trial court as to this respondent due to the provisions of Rule 41 (a) (1) of the Colorado Rules of Civil Procedure and as to the other respondents for the same reason and on other grounds as well (229-233). This decision of the state trial court was subsequently affirmed by the Supreme Court of Colorado.

Argument

The opinion of the Supreme Court of Colorado is precisely in accord with the reported decisions from federal and state courts which have interpreted identical rules of procedure. *American Cyanamid Co. v. McGhee,* 317 F.2d 295 (CA5 1963); *Engelhardt v. Bell & Howell Co.,* 299 F.2d 480 (CA8 1962); *Littman v. Bache & Co.,* 252 F.2d 479 (CA2 1958); *Thomas v. Braffet's Heirs,* 6 Utah 2d. 57, 305 P.2d 507.

The question presented by the petitioners is one of local concern only which involves a long standing state rule of civil procedure. Rule 41 (a) (1) has been in existence in the Colorado Rules of Civil Procedure for many years, and its effect is clear beyond doubt.

The Colorado Rules of Civil Procedure, while affording a plaintiff every right to commence an action for damages, set forth equitable and fair restrictions with reference to voluntary dismissals. So long as the plaintiff has not been served with his adversary's answer or motion for summary judgment, he need only file a notice or motion for dismissal with the clerk of the court. That document itself

closes the file. There is then nothing that a defendant can do to revive the case, and the court has no role to play. However, this procedure may be used once, and only once, if the clear consequences of the rule are to be avoided. A second notice of dismissal filed in any court, whether state or federal, not only closes the file in that action, but concludes the case forever.[2]

Notwithstanding the apparent lack of complete diversity of citizenship in the case filed by the petitioners in the federal court, certainly that court at least had jurisdiction to determine whether it did, in fact, have jurisdiction. However, jurisdiction is not essential to the commencement of an action, and it is the mere commencement of an action which brings into effect the provisions of Rule 41 (a) (1). Thus, when the petitioners filed their "Voluntary Dismissal Without Prejudice under Rule 41 (a) (1)" in the United States District Court, such dismissal operated as the final adjudication of the case upon its merits. Action by a federal court did not finally terminate the case, inasmuch as the decision of the Supreme Court of Colorado was based upon the application of a local state rule of procedure.

The operation and effect of Rule 41 (a) (1) are clear and obvious, and the voluntary acts of the petitioners brought the rule into play. The primary purpose of this rule is the prevention of the exact vexatious forum-shopping which the petitioners conducted in this case.

More importantly, no federal question is presented by the Petition for Writ of Certiorari. The petitioners did not even attempt to assert a federal question until after the

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[2]The application of the "double dismissal rule" has not had a harsh or unjust result here, inasmuch as the petitioner, Lewis M. Alexander, is receiving substantial payments pursuant to the Colorado Workmen's Compensation Act and has now returned to his former employment.

Supreme Court of Colorado handed down its decision in favor of the respondents. The state court has certainly not decided any federal question of substance here, and there is no conflict in the decisions of any state courts or federal courts of appeal concerning the subject matter of this case.

Conclusion

The decision of the Supreme Court of Colorado is exactly in accord with other federal and state courts which have considered this rule of procedure. The factual situation here presented resulted solely from the voluntary acts of the petitioners. We submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Order of the United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 8904

LEWIS M. ALEXANDER and RUTH M. ALEXANDER,
Plaintiffs,

vs.

MORRISON-KNUDSON CO., INC., a Delaware corporaiton; COLORADO-UTE ELECTRIC ASSOCIATION, INC., a Colorado corporation; and YAMPA VALLEY ELEC. ASSOCIATION, INC., a Colorado corporation,
Defendants.

ORDER

On May 14, 1964, prior to the institution of this action in this Court, plaintiffs had instituted a similar action in the state District Court in the City and County of Denver. On December 8, 1964, plaintiffs filed a notice of dismissal of the action in the Denver District Court, pursuant to Rule 41 (a) (1) of the Colorado Rules of Civil Procedure. This rule is essentially the same as Rule 41 (a) (1) of the Federal Rules of Civil Procedure, and in essence states that a plaintif without order of court may dismiss his action by filing a notice of dismissal at any time before filing or service by the adverse party of an answer or of a

motion for summary judgment. Rule 41 (a) (1) of both the state and federal rules also provides that unless otherwise stated in the notice of dismissal, the dismissal is without prejudice ". . . except that a notice of dismissal operates as an adjudication upon the merits . . ." when filed by a plaintiff who has once dismissed in any court, an action based on or including the same claim.

On December 10, 1964, two days after filing the notice of dismissal of the state action, plaintiffs instituted this action. The defendants appeared and filed motions to dismiss. On January 12, 1965, the plaintiffs filed a document entitled, "Voluntary Dismissal Without Prejudice Under Rule 41 (a) (1)". This Court then entered an order on January 14, 1965, dismissing the action without prejudice.

On January 15, 1965, the defendants filed a motion for an order dismissing plaintiffs' complaint with prejudice on the ground that this was the second voluntary dismissal pursuant to Rule 41 (a) (1), and by the provisions of that rule, the second dismissal operated as an adjudication upon the merits.

On January 22, 1965, the plaintiffs moved to vacate or set aside the dismissal of this action which plaintiffs had caused to be made pursuant to Rule 41 (a) (1).

Briefs were filed by the parties in support of and in opposition to both motions. Among other things, the plaintiffs contended that the voluntary dismissal of the state action was not effective, therefore, the voluntary dismissal of this action did not constitute a second dismissal and did not result in adjudication of this action upon its merits.

Since the effect of the notice of dismissal of the state action was before the state courts, this Court by order entered on April 22, 1965, stayed the proceedings in this action "until the further Order of this Court to give the parties to this action an opportunity to obtain a determination by the courts of Colorado of the status of the litigation in the state court."

On June 17, 1968, the Colorado Supreme Court issued its opinion in the state court proceeding and held among other things, that the plaintiffs' notice to dismiss the state court proceeding pursuant to Rule 41 (a) (1) was effective to dismiss the state action. Petition for rehearing was denied September 9, 1968. *Alexander v. Morrison-Knudson Co.*, —Colo.—; 444 P.2d 397.

On November 1, 1968, this Court entered an order calling attention to the foregoing decision and requiring the parties to show cause in writing why this action should not be dismissed. The parties responded and the Court is now duly advised and determines that the plaintiffs' motion to vacate or set aside plaintiffs' dismissal of this action under Rule 41 (a) (1) should be denied and that the defendants' motion for a dismissal of this action with prejudice should be granted.

IT IS THEREFORE ORDERED that the plaintiffs' motion to vacate or set aside plaintiffs' dismissal of this action pursuant to Rule 41 (a) (1) is denied.

IT IS FURTHER ORDERED that plaintiffs' dismissal of this action pursuant to Rule 41 (a) (1) of the Federal Rules of Civil Procedure operated as an adjudication of this action upon the merits and that the Clerk of this Court shall forthwith enter on the record that the dismissal of the action is with prejudice.

IT IS FURTHER ORDERED that the order of this Court entered on January 14, 1965, ordering the dismissal of this action without prejudice is hereby vacated.

Entered this 12th day of December, 1968.

BY THE COURT:

/s/HATFIELD CHILSON
United States District Judge